No. 93-313 and 93-611

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In the Supreme Court of the United States

OCTOBER TERM, 1993

BDO SEIDMAN, ET AL., PETITIONERS

v.

GAYLON D. SIMMONS, ET AL.

CONTINENTAL INSURANCE COMPANY, PETITIONER

v.

GAYLON D. SIMMONS, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA C. BIDDLE
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

SIMON M. LORNE
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

LESLIE E. SMITH
Senior Special Counsel
Securities and Exchange Commission
Washington, D.C. 20549

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QUESTIONS PRESENTED

1. Whether Section 27A(b) of the Securities Exchange Act of 1934 (Exchange Act), which provides for the reinstatement of certain private actions under Section 10(b) of the Exchange Act that were dismissed as untimely under *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), violates the separation of powers doctrine or the Due Process Clause of the Fifth Amendment as applied to a suit dismissed without prejudice.

2. Whether the Due Process Clause prohibits Congress from retroactively extending the three-year time limit for commencing a private Section 10(b) action under *Lampf*.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A38,[1] is reported at 997 F.2d 39. The opinion of the district court denying the motion for reinstatement,

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[1] Except as otherwise noted, references to "Pet. App." are to the appendix to the petition in No. 93-313.

Pet. App. A39-A54, is reported at 786 F. Supp. 587; the court's opinion denying the motion for reconsideration, Pet. App. A55-A58, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1993. A petition for rehearing was denied on August 25, 1993. 93-611 Pet. App. 34a-35a. The petition for a writ of certiorari in No. 93-313 was filed on August 26, 1993. The petition for a writ of certiorari in No. 93-611 was filed on October 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1990, respondents Gaylon D. Simmons and Gloria Annette Turner Simmons filed a securities fraud action against petitioners in the United States District Court for the Eastern District of Louisiana. The complaint stated claims arising under Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, as well as pendent state law claims. Pet. App. A5-A6, A40.

At the time the suit was filed, the Exchange Act did not contain a statute of limitations expressly applicable to claims under Section 10(b) or Rule 10b-5. In the absence of an express federal statute of limitations, the Fifth Circuit, like a number of other courts of appeals, had held that private Rule 10b-5 actions were subject to limitations periods borrowed from state law. See, *e.g.*, *Jensen* v. *Snellings*, 841 F.2d 600, 606 (5th Cir. 1988) (borrowing Louisiana statute of limitations in Rule 10b-5 action).

On June 20, 1991, while this action was pending before the district court, the Court rendered its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), holding that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e). Under that provision, a suit is untimely if brought more than one year after the fraud is discovered or more than three years after it occurs. 111 S. Ct. at 2782. On the same day that this Court decided *Lampf*, it also decided *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in which it disallowed the use in civil litigation of a judicial rule of "selective prospectivity"—the practice of applying a new judicial interpretation of the law in the case in which it is announced but not applying it to other pending suits.

Shortly thereafter, petitioners moved to dismiss this case, contending that the suit was untimely under the federal limitations period adopted in *Lampf* and made retroactive by *Beam*.[2] In August 1991, the district court granted petitioners' motion and dismissed the federal claims. In order to allow the Simmonses to pursue an amendment of their complaint in a related suit, however, the court made the dismissal without prejudice. Pet. App. A7 & n.5, A40-

[2] This Court applied its holding adopting a federal limitations period for Section 10(b) actions to the parties in *Lampf* itself. See 111 S. Ct. at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting). As a result, under *Beam*, the new limitations period adopted in *Lampf* became applicable to all other pending private Rule 10b-5 actions.

A41.[3] Two months later, the district court ordered the dismissal of the Simmonses' pendent state law claims. *Id.* at A41. The Simmonses did not appeal from those orders.

2. In December 1991, four months after the dismissal of the federal securities claims in this case, Congress enacted legislation adding Section 27A, 15 U.S.C. 78aa-1 (Supp. III 1991), to the Exchange Act. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Section 27A applies to private Rule 10b-5 actions that were commenced before June 20, 1991, the date that *Lampf* was decided. Subsection (a) of Section 27A provides that the limitations periods for such pre-*Lampf* suits shall be the limitations periods that had prevailed in the particular jurisdiction before *Lampf*. Subsection (b) of Section 27A provides for the reinstatement of pre-*Lampf* suits that were dismissed as time-barred under *Lampf* but were timely under the jurisdiction's pre-*Lampf* rules. Subsection (b) required motions for reinstatement to be filed within 60 days of the enactment of Section 27A. 15 U.S.C. 78aa-1(a) and (b) (Supp. III 1991).

In January 1992, within the 60-day period prescribed by subsection (b), the Simmonses moved to reinstate their federal securities claims. Pet. App. A7. The district court denied the reinstatement motion, *id.* at A39-A54, as well as a subsequent motion

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[3] The defendants submitted a draft order that provided that the dismissal was "with prejudice." Pet. App. A7. Before entering the order, the district court struck out the quoted words at the Simmonses' request, in order "to avoid any preclusive effect" of the judgment. *Ibid*; see *id.* at A41.

that subsection (b) violates the Due Process Clause of the Fifth Amendment and the separation of powers doctrine by reopening final judgments of federal courts. Pet. App. A56-A58.[4]

3. The Simmonses appealed. The court of appeals consolidated that appeal with the appeal from another district court decision that had held Section 27A(b) unconstitutional,[5] and the United States intervened in both appeals, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Section 27A.[6] Pet. App. A8.

The court of appeals reversed, rejecting all constitutional challenges to Section 27A(b). Pet. App. A13-A38. The court held that neither the Due Process Clause nor the separation of powers doctrine prohibits Congress from creating a statutory mechanism for reinstating previously timely suits that were dismissed as untimely under *Lampf*. Pet. App. A14-A28, A35-A38. The court also held that the

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[4] The district court also held that Section 27A is unconstitutional in its entirety under *Beam*, *supra*, because it prevents federal courts from applying *Lampf* retroactively to other pending cases. Pet. App. A49-A53. The court of appeals rejected that holding, *id.* at A33-A34, and petitioners do not raise the issue in this Court.

[5] *Pacific Mutual Life Insurance Co.* v. *First Republicbank Corp.*, No. 92-1662 (5th Cir.), petition for cert. pending *sub nom. First Republicbank Corp.* v. *Pacific Mutual Life Insurance Co.*, No. 93-609 (filed Oct. 18, 1993).

[6] When the constitutionality of an Act of Congress "affecting the public interest" is called into question in a federal suit to which the United States is not a party, 28 U.S.C. 2403(a) directs the court to "permit the United States to intervene for presentation of evidence * * * and for argument on the question of constitutionality."

Due Process Clause does not prohibit Congress from retroactively extending the limitations periods established in *Lampf*. Pet. App. A29-A33.

ARGUMENT

1. Petitioners challenge the holding of the court of appeals that Section 27A(b) of the Exchange Act is constitutional. 93-313 Pet. 6-15; 93-611 Pet. 7-12. In our view, the court of appeals correctly rejected petitioners' constitutional claims and upheld Section 27A(b). The Fifth Circuit's decision, however, conflicts with *Plaut* v. *Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993), rehearing denied (Oct. 14, 1993), in which the Sixth Circuit held that Section 27A(b) violates the separation of powers doctrine.[7]

Because the Fifth and Sixth Circuits have rendered conflicting decisions on the issue in this case, and because the Sixth Circuit's decision in *Plaut* invalidates an Act of Congress, the constitutionality of subsection (b) of Section 27A should be resolved by this Court.[8] See pages 8-9, *infra*. The present

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[7] We note that the constitutionality of subsection (b) of Section 27A is currently before the Tenth Circuit in *Johnston* v. *CIGNA Corp.*, No. 92-1186 (argued Sept. 27, 1993). The Second Circuit rejected a constitutional challenge to subsection (b) in *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, No. 92-7624 (Sept. 27, 1993), but it rested its decision on narrow grounds (the absence of a final judgment in the case) and did not decide the constitutionality of the provision as a general matter.

[8] In contrast, there is no circuit conflict over the constitutionality of subsection *(a)* of Section 27A. Seven courts of appeals have held subsection (a) to be constitutional; none has held otherwise; and this Court has twice denied certiorari petitions seeking review of that issue. See *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied,

petitions, however, are not appropriate vehicles for this Court to reach the underlying constitutional issues.

As noted above, when the district court dismissed the federal securities claims brought against petitioners, the court made the dismissal "without prejudice." Pet. App. A7. The court did so at the Simmonses' request, in order "to avoid any preclusive effect." *Ibid.* While a dismissal with prejudice bars future relitigation of the dismissed claim in accordance with conventional res judicata principles, a dismissal without prejudice "does not have a res judicata effect," *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 396 (1990), and permits the plaintiff to renew the litigation. See, *e.g.*, 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2373, at 230-231 (1971). By entering a dismissal without prejudice of the Simmonses' claims, the district court left the Simmonses free to renew their securities claims without being barred by the original dismissal.

The fact that the dismissal order allowed the Simmonses to renew their Rule 10b-5 action is fatal to petitioners' constitutional objections; indeed, the

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113 S. Ct. 1841 (1993); *Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993); *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir.), petition for cert. pending, No. 93-564 (filed Oct. 12, 1993); *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, No. 92-7624 (2d Cir. Sept. 27, 1993); *Cooke* v. *Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Berning* v. *A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 279 (7th Cir. 1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993).

dismissal "without prejudice" makes it possible to affirm the judgment permitting reinstatement on a quite narrow basis.

Petitioners make two basic arguments regarding Section 27A(b): first, that the Due Process Clause prohibits Congress from divesting litigants of rights that have been "vested" by final judgments; and second, that the separation of powers doctrine prevents Congress from compelling courts to reopen concluded litigation. Both of those arguments presuppose that the judgment at issue is genuinely final, in the sense of conclusively settling the legal dispute between the parties. But there is no such judgment here. Petitioners cannot claim that subsection (b) deprived them of "vested rights," because a dismissal without prejudice is not a judgment that confers any rights, vested or otherwise, to be free from further litigation on the dismissed claims. Nor can petitioners contend that subsection (b) improperly forces the courts to reopen concluded litigation in violation of the separation of powers doctrine, because the district court's order left the Simmonses entirely free to refile their securities claims. In sum, because petitioners did not receive a final district court judgment dismissing the complaint against them with prejudice, this Court could affirm the judgment of the court of appeals without having to reach the merits of the constitutional issue that has divided the circuits.

While the present petitions are thus an inappropriate vehicle for review, in the companion case that the Fifth Circuit decided in the same opinion that disposed of petitioners' case (see note 5, *supra*), the constitutional claims are squarely presented. See *First Republicbank Corp.* v. *Pacific Mutual Life*

Insurance Co., No. 93-609. In *First Republicbank*, the district court held Section 27A(b) to be unconstitutional for substantially the same reasons that were given by the district court in this case. *First Republicbank*, however, differs from this case in that, when the district court dismissed the federal securities claims there as untimely under *Lampf*, it entered a judgment of dismissal with prejudice. The petition in *First Republicbank* thus cleanly presents the question on which the circuits are split, and we have suggested that the Court grant the petition in that case.[9] Accordingly, the present petitions should be held pending disposition of *First Republicbank*, and then disposed of as is appropriate in light of that case.

2. Petitioners in No. 93-313 raise a separate claim that is not presented by the petition in *First Republicbank* and was not presented to the Sixth Circuit in *Plaut*. They assert (Pet. 14) that one of the two time limits recognized in *Lampf*, the three-year time limit running from the occurrence of the violation, may not be retroactively extended by Congress. According to petitioners, once the three-year period passes, potential defendants acquire a constitutional immunity from liability that Congress may not disturb.

Unlike petitioners' other arguments, which depend on the existence of a final judgment in their favor, this argument turns solely on the running of the time limit. As a result, it calls into question not only subsection (b), but Section 27A in its entirety. The court of appeals correctly rejected that argument (Pet. App. A34-A35), and its holding does not conflict

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[9] We have provided petitioners in this case with a copy of our brief in *First Republicbank*.

with any decision of this Court or any other court. Further review of that issue is not warranted.

This Court has repudiated the notion that the Constitution prohibits a legislature from extending a statute of limitations after the limitations period has run. In *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945), this Court rejected a due process challenge to a Minnesota statute that retroactively extended the limitations period for pending state securities law claims. The Court held that the statute could be applied to revive a pending claim that otherwise would have been time-barred. The Court held that "where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after [the] right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar." 325 U.S. at 311-312 (citing *Campbell* v. *Holt*, 115 U.S. 620 (1885)). Accord *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 243-244 (1976).

Relying on *William Danzer & Co.* v. *Gulf & Ship Island R.R.*, 268 U.S. 633 (1925), petitioners seek (93-313 Pet. 14) to draw a constitutional distinction between "statutes of limitation," which may be lengthened retroactively, and "statutes of repose," which assertedly may not. In *Danzer*, the Court held that the Due Process Clause prohibited Congress from extending a two-year period for making certain private claims under the Interstate Commerce Act after the period had run. 268 U.S. at 636-637. The Court distinguished between limitations periods that "apply to the remedy only," leaving the underlying liability

intact, and limitations periods that "constitute a part of the definition of a cause of action * * * and operate as a limitation upon liability." *Id.* at 637. As to the latter class of limitations periods, the Court reasoned that the passage of the period made it "as if liability had never existed," and the Court held that applying a subsequently enacted statute "retroactively to create liability" would violate the Due Process Clause. *Id.* at 636, 637.

Petitioners' reliance on *Danzer* is mistaken for at least two independent reasons. First, as the court of appeals noted (Pet. App. A30), *Danzer* rests on a view of legislative retroactivity that this Court itself has long since repudiated. *Danzer* depends on the premise that the Due Process Clause prohibits Congress from legislating "retroactively to create liability." 268 U.S. at 637. But this Court has subsequently rejected that premise. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984); *United States* v. *Sperry Corp.*, 493 U.S. 52, 57-58, 64-65 (1989); see *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2287 (1993). Under these precedents, "legislation readjusting rights and burdens is not unlawful [under the Constitution] solely because it upsets otherwise settled expectations * * * *even though the effect of the legislation is to impose a new duty or liability based on past acts.*" *Usery*, 428 U.S. at 16 (emphasis added). Whatever may have been the state of due process jurisprudence when *Danzer* was decided in 1925, the subsequent decisions in *Usery* and *Pension Benefit Guaranty Corp.* make clear that the Due Process Clause does

not prohibit Congress from "impos[ing] a new duty or liability based on past acts."

Second, petitioners have failed to show that the three-year time limit recognized in *Lampf* "constitute[s] a part of the definition of [the] cause of action * * * and operate[s] as a limitation upon liability" (*Danzer*, 268 U.S. at 637). Petitioners appear to believe that a statute of repose, by its very nature, affects the right rather than the remedy. But this Court has rejected that proposition. See, *e.g.*, *City of El Paso* v. *Simmons*, 379 U.S. 497, 506 n.9 (1965) (holding statute of repose to be "an alteration of remedy rather than obligation"). Here, as the court of appeals pointed out, the statutory provision that creates the three-year time limit (Section 9(e) of the Exchange Act) "bars an action to enforce a liability, and says nothing about the continued existence of that liability." Pet. App. A31. Thus, the three-year period would not come within the scope of *Danzer* even if *Danzer* remained good law. Cf. *Chase*, 325 U.S. at 312 n.8 (distinguishing *Danzer*).

CONCLUSION

The petitions for writs of certiorari should be held pending the disposition of *First Republicbank Corp.* v. *Pacific Mutual Life Insurance Co.*, No. 93-609, and disposed of consistently with that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA C. BIDDLE
SCOTT R. MCINTOSH
Attorneys

SIMON M. LORNE
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

LESLIE E. SMITH
Senior Special Counsel
Securities and Exchange Commission

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